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84-1517

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.

In the Matter of the Petition
of

THOMAS M. FAHEY, as Operator of Castle Rest Nursing Home,

Appellant,

v.

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York,

Appellee.

For a Judgment Pursuant to CPLR Article 78.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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35 pp

QUESTIONS PRESENTED

1. Are the provisions of New York State Administrative Procedure Act §304.4, which grants hearing officers the power to regulate the course of administrative proceedings, unconstitutional, under the Due Process clause of the Fourteenth Amendment, as applied to deny the appellant an adjournment of license revocation proceedings, when such denial effectively forecloses the opportunity to confront the evidence against the appellant, to crossexamine witnesses, and to present the appellant's side of the case?

2. Did the administrative hearing officer's exercise of authority, under the above mentioned statute, to deny the appellant an adjournment of administrative proceedings to revoke appellant's nursing home operating certificate, constitute a denial of due process under the Fourteenth Amendment?

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement	3
Substantiality of the Constitutional Question	9
The Interest at Stake	9
Administrative Due Process	12
Conclusion	13
Appendix A,-Items Required by Rule 15	A-1
Appendix B,-Pertinent Provisions of (New York) State Administrative Procedure Act Relating to Adjudicatory Proceedings	B-1

TABLE OF AUTHORITIES

Cases:

Board of Regents v. Roth, 408 U.S. 564 (1972)	10
Case v. Weinberger, 523 F.2d 602 (2d Cir. 1975)	11
Goldberg v. Kelley, 397 U.S. 254 (1970)	10,12

Page

Graham v. Richardson, 403 U.S. 365 (1971) 10

Hecht v. Monaghan, 307 N.Y. 461 (1954) 10

Hilton Hotels Corp. v. Esptein, 14 A.D.2d 399 (4th Dep't. 1961) aff'd, 11 N.Y.2d 978 (1962) 11

Hodes v. Axelrod, 84 A.D.2d 895 (3d Dep't. 1981) rev. on other grounds 56 N.Y.2d 930 (1982) 10,11

Misurelli v. City of Racine, 346 F. Supp. 43 (E.D. Wis. 1972) rev. on other grounds sub nom *City of Kenosha v. Bruno*, 412 U.S. 507 (1973) 12

900 G.C. Affiliates, Inc. v. City of New York, 367 F. Supp. 1 (S.D.N.Y. 1973) 12

Orellana v. Robbins MBW Corporation, 91 A.D.2d 1120 (3d Dep't. 1983) 11

Peo. ex rel Lodes v. Department of Health, 189 N.Y. 187 (1907) 11

Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973) 12

Constitution and Statutes:

United States Constitution:
Fourteenth Amendment 2

New York Statutes:
Public Health Law §2801-a.10(b)(i) 13

	Page
Public Health Law §2806.2	10
Public Health Law §2806.5(a)	10,Ftnt. 1
State Administrative Procedure Act:	
§101	10
§301.4	10
§301.5	10
§302.3	10
§303	10
§304.4	i,12
§306.3	10

IN THE

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In the Matter of the Petition
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THOMAS M. FAHEY, as Operator of Castle Rest Nursing Home,

Appellant,

-vs.-

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York,

Appellee,

For a Judgment Pursuant to CPLR Article 78.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of three New York State Courts, namely, the Court of Appeals, the Appellate Division (Third Department) of the Supreme Court, and the Supreme Court Special Term (Albany County) appear in the Appendix hereto.

The opinion of the Court of Appeals is reported, at 64 N.Y.2d 603 (1984), and is included at page A-1 of the Appendix.

The opinion of the Appellate Division (Third Department) of the Supreme Court is reported at 105 AD2d 537 (1984), and is included herein at pages A-2 through A-5 of the Appendix.

The opinion of the Supreme Court Special Term (Albany County) is unreported, and is included herein at pages A-6 through A-8 of the Appendix.

JURISDICTION

The judgment of the New York State Court of Appeals was rendered on December 27, 1984.

A notice of appeal to this Court was duly filed in the New York State Court of Appeals, the Appellate Division (Third Department) of the Supreme Court and the Supreme Court (Albany County) on January 25, 1985.

This appeal is being docketed in this Court within 90 days of the judgment appealed from. The jurisdiction of this Court is involved under 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ***nor shall any State deprive any person of life, liberty, or property, without due process of law***

(New York) State Administrative Procedure Act §304 provides in pertinent part:

> Except as otherwise provided by statute, presiding officers are authorized to: ***
>
> 4. Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

STATEMENT

The appellant is the operator of the Castle Rest Nursing Home in Syracuse, New York and the appellee is the Commissioner of Health of the State of New York.

The instant case arose in December, 1982 when the appellee commenced administrative proceedings, pursuant to Public Health Law §2806, to revoke the operating certificate issued to appellant as operator of Castle Rest Nursing Home, charging the appellant with failure to comply with the provisions of Article 28 of the Public Health Law by owning and operating a nursing home without having the requisite establishment approval from the Public Health Council, in violation of Public Health Law § prevailing weather conditions. The opening session was rescheduled for March 23, 1983, at Albany. The March 23 session was adjourned to April 26, 1983 because the appellant's attorney was scheduled to appear in the United States District Court for the District of Vermont on that date.

On April 26 the appellant appeared by his attorney, Dante M. Scaccia, of Syracuse, New York and the hearings proceeded before Administrative Law Judge Maureen J.M. Ely. The appellant was also present in person at the April 26 session.

The thrust of the respondent's case was that the operating certificate previously issued to the appellant could fairly be considered conditional and should be revoked because, while the appellant possessed the conditional (in the appellee's view) operating certificate, he lacked the necessary approval for the establishment of the nursing home as a facility by the Public Health Council.

The appellant had been a member of a partnership which operated Castle Rest Nursing Home, an established facility, until a dispute arose which resulted in litigation between the partners. In October, 1972, to settle the litigation, which at that point had reached the appellate courts, the appellant acquired the interests of his antagonists and, in December, 1972, applied for approval of the transfer of ownership.

An operating certificate running for two years (August 1, 1973--July 31, 1975) was issued, which was the first of a series of operating certificates issued thereafter. It was the latter series of four two-year operating certificates (8/1/75--7/31/83) which the appellee argued contained language that could be fairly interpreted as being conditional.

As to the appellant's alleged failure to obtain the approval of the Public Health Council for the establishment of Castle Rest Nursing Home as a facility, the thrust of the appellee's case was that the appellant was barred from contesting that issue by virtue of an adverse decision in a proceeding pursuant to CPLR Article 78 entitled *In the Matter of the Petition of Thomas M. Fahey, as Operator of the Castle Rest Nursing Home -against- Public Health Council, Department of Health of the State of New York,* 82 A.D.2d 702 (3d Dep't. 1982), appeal dismissed —N.Y.2d— (12/15/82).

That proceeding was commenced in the Supreme Court, Albany County, on March 22, 1977, after the Public Health Council, after hearings thereon, in November, 1976, disapproved of the appellant's application for approval. This litigation was terminated adversely to the appellant on December 15, 1982 when the Court of Appeals dismissed the appellant's appeal to that court.

After counsel for the appellee made his opening statement the appellant's attorney moved to dismiss the proceeding on the ground that there was a prior pending administrative proceeding before the Department of Health involving the identical parties and issue.

As counsel for the appellant explained, there were two administrative proceedings pending before the same hearing officer (Arne M. Heggen) during the period 1975 through 1976. The second of these, which began contemporaneously with the Public Health Council hearings, alluded to above, was held in abeyance by Hearing Officer Heggen pending the outcome of the hearings on the appellant's application for approval of the transfer of ownership, and was still pending.

The administrative law judge denied the motion to dismiss. Relying on 10 N.Y.C.R.R. §51.9(d) and finding that Hearing Officer Heggen had either died, resigned or been removed, or failed to serve, she appointed herself as Hearing Officer Heggen's successor to

hear the proceeding. In the alternative, Judge Ely found that the prior proceeding was no longer pending, or involved a different operating certificate than the one at issue here.

At that point Mr. Scaccia moved to have Judge Ely disqualify herself, purusant to the State Administrative Procedure Act, on the grounds of bias and prejudice. He argued that bias and prejudice were shown by Judge Ely's finding that Hearing Officer Heggen was dead or otherwise disqualified without any evidence of that fact, and by her refusal to provide the appellant's counsel with the opportunity to introduce the pleadings and other papers in the prior pending administrative proceeding to establish the requisite identity of parties and issues. Judge Ely denied the appellant's motion.

After the denial of the appellant's disqualification motion, the hearing proceeded to the taking of evidence.

No witnesses were called by the appellee. The evidence offered by the appellee consisted entirely of the following five items:

Department's Exh.	Description
1	Notice of Hearing and Statement of Charges, dated December 21, 1982.
2	Affidavit of Marion La Point, dated February 7, 1983, with attachment.
3	Affidavit of Victoria Ventresca, dated February 5, 1983.
4	Order of Appellate Division in the Matter of the Petition of Thomas M. Fahey, as Operator of the Castle Rest Nursing Home against Public Health Council, Department of Health of the State of New York.
5	Order of New York Court of Appeals, December 15, 1982, dismissing the appeal.

The appellant's attorney objected strenuously to the two affidavits, pointing out that the effect was to deny him the opportunity to cross-examine the deponents, who were custodians of Health Department records that were critical to the case. At the

afternoon session he advised Judge Ely that, having examined the two affidavits, he believed that he could refute their correctness and indicated that he intended to subpoena the deponents as well as other Health Department personnel and certain Health Department records.

Mr. Scaccia also indicated that he believed that he could show that in point of fact and law the appellant had been established since 1967, and that the appellee had unlawfully disestablished him without notice.

He also indicated that, in part, the appellant's defense would be based upon the effect of a mandamus judgment rendered by the Supreme Court, Albany County in April, 1975 in an Article 78 proceeding entitled *Castle Rest Nursing Home, and Thomas M. Fahey as Operator of Castle Rest Nursing Home, Petitioners, for an Order pursuant to CPLR Article 78 Reviewing and Annulling a Denial of Reimbursement Computation and Rate by Robert Whalen as Acting Commissioner of the New York State Department of Health, Respondent.*

It appeared, then, to Judge Ely that it would be necessary, given that the appellee's case was largely based upon the collateral estoppel effect of *Mtr. of Fahey v. Public Health Council,* supra., for her to review and study the record in that proceeding and she so indicated, adding that she would like to see copies of both the appellant's and the Department's briefs in that proceeding.

Mr. Scaccia stated that it was his desire to produce the full record in the 1975 mandamus proceeding, and also requested the right to adduce appropriate evidence to the appellant's defense and issue the necessary subpoenas.

Judge Ely adjourned the April 26th session at that point so that she could take the opportunity to consider the record in *Mtr. of Fahey v. Public Health Council,* supra. She indicated that once she had that material she would give the appellant a week to submit the mandamus briefs or decision. Judge Ely also indicated that a conference call, to take place after she had reviewed the *Public Health Council* record, would be in order and the conference call was, after further discussion, scheduled for May 10, 1983.

The further discussion referred to above concerned Mr. Scac-

cia's objection to the informal method of proceeding in regards to the two Article 78 proceedings. He expressed a desire to have the records of the two proceedings adduced formally as evidence in the administrative hearings in order to protect the record. Mr. Scaccia was assured that he would have the opportunity to proceed with his defense on the record.

The May 10th conference call did not take place, however. On May 23, 1983, Judge Ely wrote the attorneys and indicated that due to difficulty in obtaining the record on appeal in *Mtr. of Fahey v. Public Health Council,* supra., she had not been able to complete her review. She directed that the next hearing session be held in Albany on June 2, 1983.

Prior to the June 2nd session, however, the appellant's attorney became involved in a grand jury proceeding in the United States District Court for the District of Vermont. At Judge Ely's direction an affidavit of actual engagement was furnished and the June 2nd session in Albany was adjourned to June 15, 1983.

Thereafter, the appellant's attorney was ordered to appear for oral argument in Tompkins County Court before Judge William C. Barrett on June 15th. He promptly advised Judge Ely of this engagement by phone on June 14th, inquiring whether she had received his affidavit of engagement, which had been previously executed. Judge Ely informed Mr. Scaccia that she had not received the affidavit (as it happened, the affidavit had been delivered via express mail on June 14th but had not reached Judge Ely).

Judge Ely stated that an adjournment was not automatic upon submission of an affidavit of engagement and denied the request for an adjournment of the June 15th session.

On June 15th the appellant's attorney appeared in the Tompkins County Court in the criminal case of *People v. McGuire,* and the administrative proceeding continued in his absence in Albany. The appellee was granted judgment by default and, upon oral motion of the appellee's counsel, was granted summary judgment on the merits. Notice of this decision was given to the appellant's counsel on July 7, 1983.

On July 27, 1983 the appellant moved to reopen the default and summary judgment. By written decision dated October 6, 1983 the

appellant's motion was denied. In her transmittal letter, however, Judge Ely directed that any comments on the decision should be submitted to her within fifteen days.

The appellant timely submitted his comments. However before the period for submission of comments had passed, indeed before Judge Ely had transmitted her decision denying the appellant's motion to reopen, the appellee, through Raymond D. Sweeney, Acting Director, Office of Health Systems Management, had issued an administrative order, dated October 12, 1983, directing that a default judgment be entered against the appellant, that summary judgment be entered in favor of the Department of Health and that the operating certificate issued to the appellant be revoked.

The appellant then (December 12, 1983) commenced a special proceeding in the Supreme Court, Special Term (Albany County) seeking judgment, alternatively, reviewing, revoking and annulling the administrative order on the merits, or reopening the default and summary judgment and reinstating the case at the administrative level.

The Supreme Court, Special Term, on March 13, 1984 granted judgment in favor of the appellee dismissing the petition. The appellant then appealed to the Appellate Division (Third Department) of the Supreme Court, which affirmed the judgment of the Supreme Court on October 18, 1984.

The appellant then moved in the New York Court of Appeals for permission to appeal to that court. On December 27, 1984 the New York Court of Appeals denied the appellant's motion for permission to appeal.

The constitutional question involved herein was raised by the appellant at every stage in the proceedings below.

The Supreme Court, Special Term (Albany County) appears to have based its decision on two grounds. The first of these appears to have been based upon procedural grounds in that the court found that the appellant had failed to satisfy the two pronged test applied to applications for relief from a default under New York law (the existence of an adequate excuse for the default and the existence of a meritorious defense). The second of these grounds was

that the administrative determination was supported by substantial evidence.

In so holding, however, the Supreme Court, Special Term must necessarily have passed upon the question whether the manner in which the hearing was conducted and the quantum of evidence supporting the determination were repugnant to the Due Process Clause.

The Appellate Division (Third Department) of the Supreme Court based its decision on similar grounds, holding that upon examination that the appellant's remaining contentions, including the contention that he had been denied due process, lacked merit.

The opinion of the New York Court of Appeals merely states that the appellant's motion for permission to appeal is denied. In so doing, the court must necessarily have passed upon the question, presented to that court in the appellant's jurisdictional statement:

> 1. To what extent are the authority and discretion granted to an administrative law judge under the State Administrative Procedure Act, the Public Health Law and the Department of Health's Uniform Rules for the Conduct of Hearings to control and conduct the course of administrative adjudicatory proceedings circumscribed by the Due Process requirements of the United States and New York Constitutions, and by the petitioner-appellant's statutory right to a due process type hearing under the Public Health Law?

SUBSTANTIALITY OF THE CONSTITUTIONAL QUESTION

THE INTEREST AT STAKE

Property rights are not created by the Constitution; their source is an independent body of law which secures certain benefits and

supports a claim of entitlement to those benefits. *Board of Regents v. Roth,* 408 U.S. 564, 576-577 (1972). The doctrine that certain interests are mere privileges has been long dead in this Court. *Graham v. Richardson,* 403 U.S. 365, 374 (1971); *Goldberg v. Kelly,* 397 U.S. 254, 262, n.n. 8, 9 (1970).

New York has long recognized that a license to carry on a trade or business is to be afforded due process protection. *Hecht v. Monaghan,* 307 N.Y. 461 (1954). In 1975, New York enacted a State Administrative Procedure Act. Portions of Article 3 of that enactment, governing adjudicatory proceedings, including the proceedings herein, are included in the Appendix. The analogy to the Federal Administrative Procedure Act is readily apparent. The purpose of the state Act is to guarantee, "that the actions of administrative agencies conform with sound standards developed in this state and nation since their founding through constitutional, statutory and case law. " State Administrative Procedure Act §101 (McKinney's 1984).

To that end, parties have the right to present evidence and written argument on issue of law and fact, to crossexamine witnesses, and to expect an impartial hearing officer and a determination that is based upon the evidence in the record. State Administrative Procedure Act §§301.4, .5, 302.3, 303., 306.3. (McKinney's 1984).

Neither of the two types of licenses that are necessary to operate a nursing home in New York may be revoked, suspended, limited or annulled without a hearing. Public Health Law §§2801-a.10(b)(i), 2806.2[1] (McKinney's 1984).

Thus, while an intermediate appellate court has characterized a nursing home license as a mere privilege, *Hodes v. Axelrod,* 84 A.D.2d 895 (3d Dep't. 1981), rev. on other grounds, 56 N.Y.2d 930

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[1]Subdivision 5(a) has been added to Public Health Law §2806 since the commencement of the underlying administrative proceedings involved here, to provide that in cases where the Public Health Council has itself revoked, limited or annulled the establishment of the nursing home (the first type of license) a second hearing prior to revocation of the operating certificate (the second type of license) is not required. This amendment (L. 1983, c. 490, §1 eff. July 15, 1983) is not implicated in this proceeding, and it should be noted that the requirement that the Public Health Council itself hold a hearing has not been dispensed with.

(1982), that characterization, which is based upon *Peo. ex rel Lodes v. Department of Health,* 189 N.Y. 187 (1907) (milk peddler's license reovked for repeated selling of spoiled milk in New York City streets), is questionable in any context, let alone the situation here, in which the quality of the care provided to patients is not an issue.

Hodes v. Axelrod, supra., itself involved the application of the amendment to Public Health Law §2806.2, discussed in footnote 1, to nursing home operators who had already been accorded due process when the State succeeded in convicting the operators of medicaid fraud, a situation likewise not involved herein.

Finally, New York has also recognized that the broad authority granted to administrative hearing officers is to be exercised within the boundaries of due process, and that procedural decisions such as the grant or denial of an adjournment cannot be used in such a way as to deprive a party of the opportunity to confront the evidence against him or her, to present his or her side of the case, and to crossexamine adverse witnesses. *Orellana v. Robbins MBW Corporation,* 91 A.D.2d 1120 (3d Dep't. 1983); *Hilton Hotels Corp. v. Epstein,* 14 A.D.2d 399 (4th Dep't. 1961), aff'd, 11N.Y.2d 978 (1962).

The appellant respectfully submits, therefore, that the interest involved here is not a mere privilege, to be granted and revoked as the State of New York sees fit, but a property interest protected by the Due Process Clause of the United States Constitution.

This conclusion is fortified, and the improtance of the Federal question involved here becomes clear, when it is considered that the appellant, like perhaps thousands of other nursing home operators, is a participant in the medicaid program. Continued licensure is a condition of continued participation in the program as a medicaid provider, and the expectation of continued participation is, itself, a property interest within the protections of the Due Process Clause. *Case v. Weinberger,* 523 F.2d 602 (2d Cir. 1975).

Given the importance of the medicaid program to millions of aged citizens and their loved ones, there is a substantial federal interest in the procedures by which the several states affect existing licenses, where the states' power to protect the health, welfare and safety of the patients is not involved.

ADMINISTRATIVE DUE PROCESS

In the administrative context, due process includes the opportunity to be heard in a meaningful manner, at a meaningful time. *Raper v. Lucey,* 488 F.2d 748, 753 (1st Cir. 1973); *Goldberg v. Kelley,* 397 U.S. 254, 267 (1970). Due process also means the right to crossexamine adverse witnesses. *900 G.C. Affiliates, Inc. v. City of New York,* 367 F. Supp. 1 (S.D.N.Y. 1973); *Misurelli v. City of Racine,* 346 F. Supp. 43 (E.D. Wis. 1972) rev. on other grounds sub nom *City of Kenosha v. Bruno,* 412 U.S. 507 (1973).

Under the statute involved herein, State Administrative Procedure Act §304.4 (McKinney's 1984) an administrative hearing officer is given authority to:

> Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

Although the denial of a continuance in administrative hearings does not, in general, constitute a denial of due process, *900 G.C. Affiliates, Inc. v. City of New York,* supra., the appellant respectfully submits that the instant case is readily distinguishable.

Given the circumstances, the purpose of the June 1[illegible]h session was, at best, nebulous. No testimony had been scheduled and the hearing officer indicated that she had encountered difficulty in retrieving the record in the prior Public Health Council proceeding, which never had been offered or received in evidence.

Up to the point at which appellant's counsel followed established procedure of furnishing an affidavit of actual engagement, and then playing it safe by notifying the hearing officer by phone, on June 14th, the appellee's case had consisted of a few documents and two affidavits. As appellant's counsel pointed out, he could not crossexamine the affidavits, as well as other Health Department personnel. Likewise the documents (the allegedly "conditional" operating certificates) presented less than a complete picture of the Department's files relating to the appellant, and counsel indicated a desire to subpoena the complete file.

Under the circumstances, the denial of an adjournment effectively frustrated the appellant's opportunity right to confront what little evidence had been adduced against him, to question the persons whose affidavits had been received, and to present the appellant's side of the case.

CONCLUSION

For the reasons above noted, probable jurisdiction should be noted.

Respectfully submitted,

March 21, 1985

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APPENDIX A

OPINION OF COURT OF APPEALS OF THE STATE OF NEW YORK, dated December 27, 1984.

3 Mo.No.1262
In the Matter of the Petition of
Thomas M. Fahey, as Operator of
Castle Rest Nursing Home,
Appellant,

vs.

David Axelrod, M.D., as Commissioner of Health of the State of New York,
Respondent,
For a Judgment &c.

Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursements.
Motion for a stay dismissed as academic.

DECISION COURT OF APPEALS DEC 27 1984

———————

OPINION OF THE APPELLATE DIVISION (THIRD DEPARTMENT) OF THE SUPREME COURT OF THE STATE OF NEW YORK, dated October 18, 1984.

SUPREME COURT—APPELLATE DIVISION THIRD JUDICIAL DEPARTMENT

October 18, 1984

In the Matter of THOMAS M. FAHEY,
as Operator of Castle Rest
Nursing Home,

Appellant,

v

DAVID AXELROD, as Commissioner of
Health of the State of New York,

Respondent.

Appeal from a judgment of the Supreme Court at Special Term (Conway, J.), entered March 20, 1984 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78 to annul a determination of the Commissioner of Health revoking petitioner's operating certificated pursuant to section 2806 of the Public Health Law.

In November, 1976, petitioner's establishment application was denied by the Public Health Council after a hearing. Subsequently, that determination was upheld by this court in *Matter of Fahey v Public Health Council, Dept. of Health of State of N.Y.* (89 AD2d 702, app dsms 58 NY2d 778).

On December 21, 1982, the Department of Health (department), relying on *Matter of Fahey (supra),* advised petitioner that a proceeding to revoke his operating certificate would be commenced. Accordingly, a hearing was scheduled for February 8, 1983. This

OPINION OF THE APPELLATE DIVISION (THIRD DEPARTMENT) OF THE SUPREME COURT OF THE STATE OF NEW YORK, dated October 18, 1984.

hearing was adjourned to March 23, 1983 due to inclement weather. However, the hearing was not held until April 26, 1983 due to petitioner's attorney's conflicting engagement.

During this hearing, a dispute arose concerning the collateral effect of this court's decision in *Matter of Fahey (supra)* relative to the issue of petitioner's establishment approval. The hearing was then adjourned and the next hearing date was set for June 2, 1983. This hearing date was later adjourned to June 15, 1983 due to petitioner's attorney's conflicting engagement. On June 13, 1983, petitioner's attorney mailed an affidavit stating that he had another engagement on June 15, 1983. On June 14, 1983, petitioner's attorney telephoned the administrative law judge to ensure that she had received the affidavit and his request for an adjournment. Petitioner's attorney was informed that it had not been received and that his request for an adjournment was denied.

OPINION OF THE APPELLATE DIVISION (THIRD DEPARTMENT) OF THE SUPREME COURT OF THE STATE OF NEW YORK, dated October 18, 1984.

On June 15, 1983, the hearing was held in the absence of petitioner and his attorney. The administrative law judge, having reviewed the prior proceedings, at this time rendered an oral decision. Specifically, she found that the issue of petitioner's establishment had been fully litigated in *Matter of Fahey v Public Health Council, Dept. of Health of State of N.Y. (supra).* Based upon the above, and noting petitioner's failure to appear, the administrative law judge directed that a "default judgment" be entered (see State Administrative Procedure Act, §301, dubd 5). The administrative law judge also granted the department's motion for summary judgment.

On July 27, 1983, petitioner applied to the administrative law judge to reopen the default. This application was denied on the ground that petitioner had no reasonable excuse for his default and lacked a meritorious defense. In due course, the Commissioner of Health adopted the administrative law judge's determination and issued an order revoking petitioner's operating certificate. This CPLR article 78 proceeding was then commenced. Special Term dismissed the petition and this appeal ensued.

Petitioner's primary contention is that he has a meritorious defense. This contention is wholly without merit since, contrary to petitioner's argument, the issue of his establishment approval was fully litigated in *Matter of Fahey v Public Health Council, Dept. of Health of State of N.Y. (supra).* Accordingly, collateral estoppel bars petitioner from relitigating the issue of establishment approval; since an establishment approval is a prerequisite to retaining an

operating certificate *(Matter of Spiegel v Whalen,* 44 NY2d 745; *Matter of Lap v Axelrod,* 97 AD2d 583), respondent's determination has a rational basis.

We have examined petitioner's remaining contentions and find them lacking in merit. The judgment should, therefore, be affirmed.

Judgment affirmed, without costs.

KANE, J.P., MAIN, MIKOLL, YESAWICH, JR. and HARVEY, JJ., concur.

OPINION OF THE SUPREME COURT, SPECIAL TERM (ALBANY COUNTY), OF THE STATE OF NEW YORK, dated March 8, 1984.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Petition of
THOMAS M. FAHEY, as Operator of
Castle Rest Nursing Home,

Petitioner,

-against-

DAVID AXELROD, M.D., as Commissioner
of Health of the State of New York,

Respondent,

For a Judgment Pursuant to CPLR Article 78.

Supreme Court, Albany County Special Term, January 6, 1984
Justice Edward S. Conway, presiding
(Calendar #13)

APPEARANCES:

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OPINION OF THE SUPREME COURT, SPECIAL TERM (ALBANY COUNTY), OF THE STATE OF NEW YORK, dated March 8, 1984.

HON. ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Respondent
Providence Baker, Deputy Assistant Attorney General, Of Counsel
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Albany, New York 12224

CONWAY, J:

This is an Article 78 proceeding in which petitioner seeks a judgment: 1) reviewing the order of respondent Commissioner of Health dated October 12, 1983 which adopted a judgment by Administrative Law Judge Maureen J. M. Ely granting summary judgment against petitioner on the merits, and in the alternative, reviewing and annulling the said order of respondent Commissioner of Health and directing respondent to reinstate the administrative proceeding.

The underlying administrative proceeding on which the instant Article 78 proceeding is predicated was commenced on February 28, 1983 and was to determine whether petitioner's operating certificate to operate the Castle Rest Nursing Home should be revoked because he failed to comply with the provisions of Article 28 Public Health Law by owning and operating a nursing home without having the requisite establishment approval from the Public Health Council. The February 1983 return date of the hearing was adjourned to March 23, 1983 due to inclement weather. The March 23, 1983 date was then adjourned to April 26, 1983 at the request of the attorney for the petitioner who claimed a prior engagement on that day. On April 26, 1983, the petitioner appeared by his attorney as did the respondent by the Department of Health. A full hearing was held on that date and a further hearing was scheduled for June 2, 1983. On June 2, 1983, the attorney for petitioner

OPINION OF THE SUPREME COURT, SPECIAL TERM (ALBANY COUNTY), OF THE STATE OF NEW YORK, dated March 8, 1984.

was unable to appear as he advised the Administrative Law Judge of another engagement. The hearing was therefore adjourned to June 15, 1983. On June 15, 1983, petitioner's attorney did not appear nor did petitioner. The respondent made a motion for a default judgment and for a summary judgment on the grounds of collateral estoppel. The motion was granted by the Administrative Law Judge and the operating certificate issued to petitioner was revoked.

The petitioner then moved to reopen his default on July 27, 1983 and by a decision dated October 6, 1983, the Administrative Law Judge denied petitioner's motion. Petitioner is contending herein that the respondent's order deprived petitioner of his valid operating certificate without a full hearing and was therefore illegal and, alternatively, even if not illegal in that respect, the denial of an adjournment to petitioner is tantamount to a denial of petitioner's right to a hearing and was arbitrary and capricious under all of the circumstances.

This Court cannot agree with the contentions of the petitioner. Petitioner was provided the opportunity for a full administrative hearing but he defaulted without adequately giving an excuse for his default or a meritirious defense. Further, the Administrative Law Judge decided on the merits that petitioner was barred by collateral estoppel; the same issues had previously been litigated up to the New York Court of Appeals.

This Court, after carefully reviewing the record presented, decides that the respondent acted in accordance with the law on a rational basis and this Court will not disturb that decision (see Matter of *Howard v. Wyman,* 28 NY2d 434; *Pell v. Board of Education,* 34 NY2d 222).

The petition is dismissed.

Respondent to submit order.

OPINION OF THE SUPREME COURT, SPECIAL TERM (ALBANY COUNTY), OF THE STATE OF NEW YORK, dated March 8, 1984.

All papers to the Attorney General for filing
upon entry of the order hereon.
Decision mailed 3/8/84.

**ORDER APPEALED FROM,
ENTERED DECEMBER 27, 1984.**

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of December A.D. 1984

PRESENT, HON. LAWRENCE H. COOKE, Chief Judge, presiding.

---

3 Mo.No.1262
In the Matter of the Petition of
Thomas M. Fahey, as Operator of
Castle Rest Nursing Home,

Appellant,

vs.

David Axelrod, M.D., as Commissioner
of Health of the State of New York,

Respondent,

For a Judgment &c.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

ORDER APPEALED FROM
ENTERED DECEMBER 27, 1984.

S/ DONALD M. SHERAW

Donald M. Sheraw
Clerk of the Court

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, dated January 25, 1985.

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

---x

In the Matter of the Petition
of
THOMAS M. FAHEY, as Operator of Castle Rest Nursing Home, Index No. 18550-83
Appellant,
-against-
DAVID AXELROD, M.D., as Commissioner of Health of the State of New York,
Appellee,
For a Judgment Pursuant to CPLR Article 78.

---x

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that THOMAS M. FAHEY, as Operator of Castle Rest Nursing Home, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York denying the appellant's motion for leave to appeal to the Court of Appeals of the State of New York, from an order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department affirming a judgment of the Supreme Court of the State of New York, Albany County, which said order denying the appellant's motion for leave to appeal was entered on December 27, 1984.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, dated January 25, 1985.

This appeal is taken pursuant to 28 U.S.C. §1257(2). January 25, 1985.

S/ ROBERT A. TRAYLOR

SCACCIA LAW FIRM
Attorneys for Appellant
300 Wilson Building
306 South Salina Street
Syracuse, New York 13202
(315) 422-4000

TO: Clerk of the Court of Appeals
Albany County Clerk
Clerk of the Supreme Court-Appellate Division
Third Judicial Department
Hon. Robert Abrams
Attorney General of the State of New York
The Capitol
Albany, New York 12224

APPENDIX B

PERTINENT PROVISIONS OF THE NEW YORK STATE ADMINISTRATIVE PROCEDURE ACT RELATING TO ADJUDICATORY PROCEEDINGS

§301. Hearings***

4. All parties shall be afforded an opportunity to present written argument on issues of law and an opportunity to present evidence and such argument on issues of fact, provided however that nothing contained herein shall be construed to prohibit an agency from allowing parties to present oral argument within a reasonable time. In fixing the time and place for hearings and oral argument, due regard shall be had for the convenience of the parties. ***

5. [See also subd. 5 above.] Unless precluded by statute, disposition may be made of any adjudicatory proceeding by stipulation, agreed settlement, consent order, default, or other informal method.

§302. Record***

3. Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

§303. Presiding officers

Except as otherwise provided by statute, the agency, one or more members of the agency, or one or more hearing officers designated and empowered by the agency to conduct hearings shall be presiding officers. Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or dis-

qualification of a presiding officer, the agency shall determine the matter as part of the record in the case, and its determination shall be a matter subject to judicial review at the conclusion of the adjudicatory proceeding. Whenever a presiding officer is disqualified or it becomes impractical for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

§306. Evidence***

3. A party shall have the right of cross-examination.

No. 84-1517 (2)

Office-Supreme Court, U.S.
FILED
MAY 24 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

IN THE MATTER OF THE PETITION

OF

THOMAS M. FAHEY, as Operator of Castle Rest Nursing Home,

Appellant,

against

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York,

Appellee,

For a Judgment Pursuant to CPLR Article 78.

ON APPEAL FROM THE NEW YORK APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

MOTION TO DISMISS OR AFFIRM

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Solicitor General,
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ALAN W. RUBENSTEIN
Assistant Attorney General,
State of New York
Of Counsel

Dated: May 17, 1985

BEST AVAILABLE COPY

Question Presented.

Whether a substantial federal question is presented by the refusal of state courts to vacate an order revoking appellant's nursing home operating certificate and to reopen the underlying administrative proceeding where (1) appellant's counsel defaulted in appearing at the administrative proceeding after adequate notice and (2) such courts determined that appellant lacked a meritorious defense as to such revocation and that such default was inexcusable?

Table of Contents.

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Motion to Dismiss or Affirm	1
Preliminary	2
Statement of the Case	2
Decision of the Administrative Law Judge	9
Reasons for Granting the Motion	11
Conclusion	13
Order of the New York Appellate Division, Third Judicial Department, Entered October 26, 1984	E-1

TABLE OF AUTHORITIES.

	Page
CASES:	
Boddie v. Connecticut, 401 US 371 (1971)	12
Cohen v. California, 403 US 15 (1971)	2
Dahnke v. Walker Milling Co. v. Bondurant, 257 US 282 (1921)	2
Fahey v. Public Health Council, Dept. of Health of the State of New York, 89 AD2d 702, 453 NYS2d 822 (3d Dept), *appeal dismissed* 58 NY2d 778, 445 NE2d 216 (1982)	3
Hollander v. Whalen, 68 AD2d 990, 414 NYS2d 808 (3d Dept 1979)	8
Spiegel v. Whalen, 44 NY2d 745, 376 NE2d 1323 (1978)	8
Windsor v. McVeigh, 93 US 274 (1876)	12
NEW YORK STATUTES:	
Civil Practice Law and Rules, Article 78	9
Civil Practice Law and Rules 5015(a)	9
Public Health Law § 2801-a	2
Public Health Law § 2806	2, 3
State Administrative Procedure Act § 301(5)	12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-1517

IN THE MATTER

OF

The Petition of THOMAS M. FAHEY, as Operator of Castle Rest Nursing Home,

Appellant,

against

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York,

Appellee,

For a Judgment Pursuant to CPLR Article 78.

ON APPEAL FROM THE NEW YORK APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

MOTION TO DISMISS OR AFFIRM.

Preliminary.

Appellant argues that this Court has jurisdiction because "there is a substantial Federal interest in the procedures by which the several states affect existing licenses (J.S., p 11) and that "the denial of an adjournment frustrated the appellant's opportunity to confront * * *, to question * * * and to present the appellant's side of the case" (J.S., p 13).

Appellee's position is that the questions that appellant posits cannot properly be reached by the Court because appellant was foreclosed from pursuing them in State court by reason of his default in appearing in an administrative proceeding after adequate notice. Thus, appellee moves the Court to dismiss the appeal on the ground that it is manifest that it fails to present a substantial federal question or, indeed, any federal question.*

Statement of the Case.

Appellant is the operator of Castle Rest Nursing Home. Nursing homes may be operated in New York by a person who has received both Public Health Council establishment (New York Public Health Law § 2801-a) and an operating certificate from the State Commissioner of Health (*see* New York Public Health Law § 2806). In 1966, appellant had been established as a partner with his then partners. When that partnership was dissolved, it became necessary for appellant to obtain Public Health Council

---

*While in some cases the validity of a statute as applied may provide a basis for a direct appeal (*see Cohen v. California*, 403 US 15, at 17 and 18 [1971] and *Dahnke Walker Milling Co. v. Bondurant*, 257 US 282, at 288 and 289 [1921]), we question whether an appeal lies in this case in which appellant merely challenges action taken by the Administrative Law Judge under the authority of an enabling statute.

approval for his establishment as a sole proprietor. On November 19, 1976, after an administrative hearing, the Public Health Council disapproved that application for two reasons. The first was that appellant had not demonstrated that he had the character to operate the facility since he had been convicted of filing false and fraudulent income tax returns. The second was that he had not demonstrated that there were adequate financial resources to operate the facility (388).* Appellant obtained review of that order before the New York Appellate Division, Third Judicial Department, which in a July 22, 1982 decision held that the determination of the Public Health Council was supported by substantial evidence (*see Fahey v. Public Health Council, Dept. of Health of the State of New York*, 89 AD2d 702, 453 NYS2d 822 [3d Dept], *appeal dismissed* 58 NY2d 778, 445 NE2d 216 [1982]).

Because appellant lacked the requisite establishment, the Department instituted proceedings to revoke his operating certificate. The December 21, 1982 Notice of Hearing (57), in the instant case, informed appellant that a determination would be made pursuant to New York Public Health Law § 2806 whether to revoke his operating certificate or to levy fines and/or civil penalties. The Statement of Charges charged and alleged:

> "[T]hat the Respondent [appellant here] has failed to comply with the provisions of Article 28 of the Public Health Law by owning and operating a nursing home without having the requisite establishment approval from the Public Health Council in violation of Public Health Law, § 2801-a" (60, 61).

*These references are to the Record on Appeal below.

The Notice of Hearing informed appellant that "whether or not the Respondent appears at the hearing, the hearing will proceed." (58)

The hearing was to commence on February 8, 1983 (57). It actually commenced, however, on April 26, 1983 (64). There were two adjournments (66). The first was occasioned by the weather. When the second adjournment was sought by appellant's attorney and granted, the Administrative Law Judge required the filing of an affidavit of engagement of counsel. *Idem.* Counsel had declined to file such an affidavit because of what he termed the "serious sensitive nature [of the matter] in Federal Court" (67). At the April 26, 1983 hearing, counsel for the Department stated that:

> "Mr. White: Your Honor, I would just like to briefly address myself to that point as well. I will note for the record [sic] as I did in correspondence to yourself and copies to Mr. Scaccia that I spoke to him on the date of the last hearing and the number that I reached him at was in Syracuse. I understand Mr. Scaccia that he was actually engaged in a proceeding in Burlington, Vermont. I am at a loss as [sic] how I reached him at a Syracuse number when he was actually engaged in a proceeding in Burlington, Vermont." (69, 70)

As to the merits, the Department asked the Administrative Law Judge to take notice of the prior Appellate Division decision and stated "that the defense which Mr. Scaccia has indicated he will be raising has been previously been [sic] disposed of and collateral estoppel should bar the litigation * * *" (140, 141).

Counsel for the Department, after presenting arguments in support of the proposition that appellant had not been approved as a sole proprietor of the Castle Rest Nursing Home and that the subject administrative proceeding was barred by collateral estoppel (142), rested on behalf of the Department (144).

Counsel for appellant did not present witnesses on April 26, 1983. Rather, he argued in support of the proposition that appellant possessed the requisite establishment.* Departmental counsel reiterated his position that every point appellant was arguing had previously been argued before the Appellate Division in the prior litigation. The Administrative Law Judge stated that she would look at the briefs and record in the prior matter (171, 179).

At the conclusion of the proceedings on April 26, 1983, the Administrative Law Judge suggested May 18 for the next date. Counsel for appellant stated that he was scheduled to be in federal court on the 16th and that he did not know how long that engagement would last (185). June 2, when proffered by the Administrative Law Judge, however, was accepted by counsel who stated "[t]hat is fine by my calendar" (185). It was not, however, until June 15, 1983 that the administrative proceeding reconvened. There was no appearance by appellant or his attorney.

At the hearing on June 15, the Administrative Law Judge traced the history of the proceeding, noting that while it was originally to commence February 8, 1983, there had been an adjournment to March 23, 1983 because of the weather and that "[t]he day before the hearing was

*Throughout the hearing, Mr. Scaccia, counsel for appellant, asserted that appellant was, indeed, established because he had received prior establishment as a partner.

commenced I received a call from Mr. Scaccia informing me that he was engaged in another matter" and he requested an adjournment. She granted that request and asked for an affidavit of engagement. She stated that the hearing was rescheduled to April 26 and that she had "still not received his affidavit of actual engagement at that session" (38).

The Administrative Law Judge stated that the day before the June 2, 1983 reconvening date, counsel had called her and informed her that he was to be in the United States District Court in Vermont on a grand jury matter. She required that an affidavit of actual engagement be filed with her by ten o'clock on the morning of June 2, 1983 for the adjournment to be granted. It was delivered by Federal Express (48). She rescheduled the matter for June 15 after directing her secretary to inform counsel by telephone that the matter had been so rescheduled. At the June 15 hearing, she said:

> "Yesterday, June 14, 1983, at approximately 3:15 in the afternoon I received a phone call from Dante Scaccia who inquired as to whether I had received his affidavit of actual engagement. At that time not only had I not received Mr. Scaccia's affidavit, I had no inkling that he would not be present at the hearing. In the phone call that I had with Mr. Scaccia he informed me that he hadn't received my letter until five days after mailing and that he hadn't been in the office at all during the week of June 6th, and returned to the office on June 10th at 6:30, too late to call for a request for adjournment. He informed me he was a solo practitioner, that his secretary was 'a new girl', and not entrusted with opening mail and that on June 15 he was scheduled to appear on an order to show cause in Ithaca.

"I informed Mr. Scaccia that he had notice of the rescheduled date of hearing since June 2, and even if the mail had been delayed and not received until June 10 that I had received no request for adjournment prior to his eleven-hour inquiry regarding the receipt of his affidavit of actual engagement.

"I also informed him that there was no automatic adjournment obtainable simply by sending an affidavit of actual engagement and making inquiries as to whether it had arrived. I further informed him that he was not granted an adjournment for the preceding [sic] scheduled for June 15, 1983. * * *" (40, 41)

Counsel for the Department noted its objection to any further adjournment, and, citing a decision of the Supreme Court, Nassau County, dated January 2, 1983, in *Matter of Walston v. Axelrod*, argued that counsel should have requested to be relieved of his obligation or should have engaged qualified associate counsel (42-44). He reasserted the Department's position that the appellant was collaterally estopped from raising the establishment issue (45).

The Administrative Law Judge stated that she had reviewed the prior proceeding and had found that the Castle Rest Nursing Home was established by the Board of Social Welfare on June 23, 1966 as a partnership; that the partnership broke up; that there was litigation resulting in an arbitration award in September, 1970 at which time Mr. Fahey's partnership interest was terminated, and that he was to receive $170,000 (49).

In March of 1971, she stated, Castle Rest applied for a change in establishment to have the certificate reflect that Jane and Walker McKinney were the operators and that application was approved in 1971 (50). On October 19, 1972, the real property was conveyed by McKinney to Castle Rest Facilities Corporation. Mr. Fahey was its sole stockholder. He thereafter applied for establishment approval.

In reliance upon *Spiegel v. Whalen*, 44 NY2d 745, 376 NE2d 1323 (1978), and *Hollander v. Whalen*, 68 AD2d 990, 414 NYS2d 808 (3d Dept 1979), she rejected appellant's claim and found that the issue of the "*ad infinitum* nature of Mr. Fahey's establishment approval * * * was before the Appellate Division when it considered its decision", and that it had been fully and fairly litigated (52). Based upon that finding, the failure of counsel or Mr. Fahey to appear on June 15, 1983 and the history of adjournment in the case, she stated that:

> "* * * a summary judgment motion has been granted as well as a default entered. This is a hybrid judgment, but I wish the Order to reflect that the record on appeal has been gone into and the issue that Mr. Scaccia raised as his absolute defense appears to be totally without merit." (54)

Appellant served motion papers dated July 27, 1983 for an order reopening the default upon the grounds that (214):

> "1. That the default herein was excusable.
>
> "2. That the respondent has a meritorious position in this proceeding.

"3. That the instant summary judgment was rendered without notice to the respondent."

Decision of the Administrative Law Judge (225).

Looking to the cases decided under New York Civil Practice Law and Rules 5015 (a) for guidance, the Administrative Law Judge found that a party may be relieved of a default upon a showing that the default was excusable and that a meritorious defense exists. She recounted the history of the adjournments in the case and of the communications in respect to the requested adjournment of June 15, 1983 which had been denied. She referred to New York case law as deciding that it was " '. . . unreasonable for both petitioner and her attorney to expect that legitimate interests of the People of the State of New York should be thwarted in order to accommodate his litigation calendar' " (228).

The Administrative Law Judge also stated that she was giving great weight to whether appellant had a meritorious defense in considering whether to vacate the default. She reviewed the prior proceedings, as well as other litigation involving Castle Rest which had been relied upon by appellant, and applied the collateral estoppel bar, holding that "the issue of his continuing establishment * * * cannot now be relitigated" (233). Finding no merit to counsel's contentions that appellant enjoyed uninterrupted establishment since 1966, she denied the motion to vacate (234).

An order revoking appellant's operating certificate was signed on behalf of the State Commissioner of Health on October 12, 1983 (34). Appellant then commenced a proceeding pursuant to New York Civil Practice Law and Rules, Article 78, to review that determination of a public officer. He sought judgment:

"1) Reviewing annulling and revoking the order of the respondent Commissioner of Health dated October 12, 1983 granting judgment by default and summary judgment against petitioner on the merits;

"2) In the alternative, reviewing annulling and revoking the said order of the respondent commissioner of Health and directing the respondent to reinstate the administrative proceeding as an administrative proceeding to proceed to an administrative determination upon a full and complete administrative record after affording the petitioner the opportunity to be heard;

"3) * * * [a stay]."

The New York Supreme Court, Albany County, held, in an unreported decision:

"Petitioner was provided the opportunity for a full administrative hearing but he defaulted without adequately giving an excuse for his default or a meritorious defense. Further, the Administrative Law Judge decided on the merits that petitioner was barred by collateral estoppel; the same issues had previously been litigated up to the New York Court of Appeals.

"This Court, after carefully reviewing the record presented, decides that the respondent acted in accordance with the law on a rational basis and this Court will not disturb that decision (see *Matter of Howard v. Wyman*, 28 NY2d 434; *Pell v. Board of Education*, 34 NY2d 222)."

The New York Appellate Division, Third Judicial Department held (J.S., p A-2 [105 AD2d 537, 481 NYS2d 481 (1984)]):

> "Petitioner's primary contention is that he has a meritorious defense. This contention is wholly without merit since, contrary to petitioner's argument, the issue of his establishment approval was fully litigated in *Matter of Fahey v. Public Health Council, Dept. of Health of State of N.Y.* (*supra*). Accordingly, collateral estoppel bars petitioner from relitigating the issue of establishment approval; since an establishment approval is a prerequisite to retaining an operating certificate (*Matter of Speigel v. Whalen*, 44 NY2d 745; *Matter of Lap v. Axelrod*, 97 AD2d 583), respondent's determination has a rational basis.
>
> "We have examined petitioner's remaining contentions and find them lacking in merit. The judgment should, therefore, be affirmed."

A copy of its October 26, 1984 order is reproduced at page E-1, *infra*.

The New York Court of Appeals denied appellant's application for leave to appeal (J.S., p A-1), 64 NY2d 603, 475 NE2d 474 (1984).

Reasons for Granting the Motion.

The New York State Administrative Procedure Act provides that an adjudicatory proceeding may be disposed of

upon a default (§ 301 [5]).* In this case, the New York Appellate Division found appellant's contention "that he has a meritorious defense" to be "wholly without merit." In holding appellant's remaining contentions to be "lacking in merit", that court found appellant's default to be inexcusable. The entry of such a default after adequate notice, as is the case here, does not deny appellant due process of law. *Boddie v. Connecticut*, 401 US 371, 378 (1971); *Windsor v. McVeigh*, 93 US 274, 278 (1876). Whether a default after the giving of proper notice should be excused presents questions solely of state law, not federal law. New York courts have examined the proferred excuses and declined to open the default. That action does not present any federal question, much less a substantial federal question.

---

*New York State Administrative Procedure Act § 301 (5) provides that:

"§ 301. Hearings.

"1. * * *

* * *

"5. Unless precluded by statute, disposition may be made of any adjudicatory proceeding by stipulation, agreed settlement, consent order, default, or other informal method."

CONCLUSION.

The appeal should be dismissed for want of a substantial federal question or, in the alternative, the order of the New York Appellate Division, Third Judicial Department, should be affirmed.

Dated: Albany, New York
May 17, 1985

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellee

ROBERT HERMANN
Solicitor General,
State of New York

PETER H. SCHIFF
Deputy Solicitor General,
State of New York

ALAN W. RUBENSTEIN
Assistant Attorney General,
State of New York

of Counsel

Order of the New York Appellate Division, Third Judicial Department, Entered October 26, 1984.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department in the City of Albany, New York, commencing on the 4th day of September, 1984.

Present:

Hon. T. Paul Kane, Justice Presiding,
Hon. Robert G. Main,
Hon. Ann T. Mikoll,
Hon. Paul J. Yesawich, Jr.,
Hon. Norman L. Harvey, Associate Justices.

In the Matter of the Petition of THOMAS M. FAHEY, as Operator of Castle Rest Nursing Home,

Petitioner-Appellant,

against

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York,

Respondent.

The appellant having appealed from a judgment of the Supreme Court at Special Term (Conway, J.), entered

March 20, 1984 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR Article 78, to annul a determination of the Commissioner of Health revoking petitioner's operating certificate pursuant to section 2806 of the Public Health Law, and said appeal having been presented during the above-stated Term of this Court, and having been argued by Dante M. Scaccia, Esq., of Counsel for appellant, and by Alan W. Rubenstein, Assistant Attorney General, of Counsel for respondent, and after due deliberation, the Court having rendered a decision on the 18th day of October, 1984, it is hereby

ORDERED, that the judgment appealed from be and the same hereby is affirmed, without costs.

Enter:

/s/ MICHAEL J. NOVACK
Clerk

Dated and Entered: October 26, 1984

A True Copy
MICHAEL J. NOVACK
Clerk

Office - Supreme Court, US
FILED
JUN 3 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

(3)

No. 84-1517

In the Matter of the Petition
of

THOMAS M. FAHEY, as Operator of Castle Rest Nursing Home,

Appellant,

v.

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York,

Appellee,

For a Judgment Pursuant to CPLR Article 78.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

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13 pp

TABLE OF CONTENTS

Page

POINT I Response to Appelle's Statement of the Case . 1

POINT II Response to Appellee's Statement of the Reasons for Granting the Motion 4

Conclusion 6

Appendix A—Order of Hon. J. Robert Lynch dtd. 1/31/85 (Axelrod v. Fahey) A1

TABLE OF AUTHORITIES

Cases:

Axelrod v. Fahey, ———Misc. 2d———(Sup Ct. Onondaga Co. 1985) 3, A1

Bodie v. Connecticut, 401 U.S. 371 (1971) 4

Kupersmith v. Public Health Council, 101 A.D.2d 918, (3d Dep't. 1984), aff'd. 63 N.Y.2d 904 (1984) 2, 3

Hollander v. Whalen, 68 A.D.2d 990 (3d Dep't. 1979) .. 2, 3

Spiegel v. Whalen, 44 N.Y.2d 746 (1978) 2, 3

Windsor v. McVeigh, 93 U.S. 274 (1876) 4, 5

New York Statute:

Public Health Law §2801-a.4.(b) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1517

In the Matter of the Petition
of

THOMAS M. FAHEY, as Operator of Castle Rest Nursing Home,

Appellant,

v.

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York,

Appellee,

For a Judgment Pursuant to CPLR Article 78.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

POINT I

RESPONSE TO APPELLEE'S STATEMENT OF THE CASE

In his Statement of the Case, appellee correctly states that in 1966 appellant was established as a member of a partnership operating Castle Rest Nursing Home. He then states that: "When that partnership was dissolved, it became necessary for appellant to obtain Public Health Council approval for his establishment as a sole proprietor." (Mot. to Dismiss or Affirm, p. 2-3.) Appellant respectfully submits that appellee is wrong both on the facts and the law.

Appellee's characterization of the manner in which appellant came to be the sole proprietor of Castle Rest Nursing Home is, in point of fact, a mischaracterization. It glosses over the fact that the partnership was not voluntarily dissolved but was torn asunder by bitter and hotly contested litigation.

Further, establishment approval, once granted, does not become void by opeation of law, in the absence of some action taken by the person established to terminate that establishment. *Kupersmith v. Public Health Council,* 101 A.D.2d 918 (3d Dep't. 1984), aff'd. 63 N.Y.2d 904 (1984). Moreover, the New York Legislature has made explicit appellant's contention that establishment approval, as a member of a partnership, once granted, cannot be adversely affected by the ex parte actions of other partners, by amending Public Health Law §2801-a to provide that established partners need not reapply to the Public Health Council for establishment approval upon a change in the partnership which is the operator of a hospital (a nursing home is defined as a hospital under New York law). Public Health Law §2801-a.4.(b), as amended L. 1984, c. 969§2, eff. Aug. 6, 1984 (McKinney's Consolidated Laws of New York, Interim Annotation Service, April, 1985, p. 935.)

In view of the foregoing, appellant respectfully submits that his contention that New York law recognizes a property right in nursing home licensure which is protected by the Due Process Clause is fortified by *Kupersmith v. Public Health Council, supra.,* and by this recent change in the statute referred to by appellee.

Finally, appellant respectfully submits that *Spiegel v. Whalen,* 44 N.Y.2d 746 (1978) and *Hollander v. Whalen,* 68 A.D.2d 990 (3d Dep't. 1979) cited by appellee as being relied on by the Administrative Law Judge (Mot. to Dismiss or Affirm, p. 8), as well as references to appellant's conviction for income tax evasion (*Id.*, at 3) are nothing more than red herrings. Not only were Messers Spiegel and Hollander convicted of felonies arising out of the operation of their respective nursing homes, but

the holding in *Spiegel, supra.,* ie that Mrs. Spiegel, as surviving partner, was required to apply for establishment approval as a sole proprietor was rendered highly dubious by *Kupersmith, supra.,* and legislatively overruled by the recent amendment to Public Health Law §2801-a.4.(b) discussed above. *Hollander, supra.,* merely held that procedings would not lie to revoke the establishment approval of an operator who was convicted before he had been issued an operating certification.

In any event, the crime for which the appellant was convicted was not the basis for the underlying administrative proceedings, and could not be. Under New York law tax evasion is not a felony, and the Supreme Court of the state of New York so held in *Axelrod v. Fahey,* ———Misc. 2d———(Sup. Ct. Onondaga Co., 1/31/85, reproduced at A1).

POINT II

RESPONSE TO APPELLEE'S STATEMENT OF THE REASONS FOR GRANTING THE MOTION

While appellee concedes that in an appropriate case the jurisdiction of this Court on appeal may be exercised to determine the validity of a statute or rule, it would appear that he contends that appellate jurisdiction does not extend to this case because appellant, "merely challenges action taken by the Administrative Law Judge under authority of an enabling statute." (Mot. to Dismiss or Affirm, p. 2).

As *Bodie v. Connecticut,* 401 U.S. 371 (1971) points out, there have been many instances when this Court has applied constitutional scrutiny to a facially valid and apparently neutral statute or rule which, as applied in a particular case, or to a particular person or class, has resulted in a deprivation of due process. *Id.*, at 379.

What the Due Process Clause requires is the opportunity to be heard, granted at a meaningful time and in a meaningful manner. While a litigant who, having been afforded such opportunity, violates, without justifiable excuse, a procedural rule or a rule for the production of evidence, has not been denied due process, *Bodie v. Connecticut, supra.*, the litigant who suffers the manipulation of a staute or rule to deprive him of property without a meaningful opportunity to be heard may invoke the jurisdiction of this Court.

Windsor v. McVeigh, 93 U.S. 274 (1876), relied on by appellee, is a case in point. Acting pursuant to a Civil War forfeiture statute, the federal government, in 1863, commenced a forfeiture action against property located within federal territory. The owner of the property sought to appear by an attorney and file an answer. The district court struck the answer, because the owner defendant was then a resident of the city of Richmond, then Confederate territory, and upon his default, a judgment of forfeiture was entered.

After the war, the former owner commenced an action to recovcer his land. On appeal of an adverse judgment in that action to this Court, it was observed that a sentence of a court pronounced against a party without hearing him, or giving him an opportunity to speak, is in fact a mere arbitrary edict, clothed in the form of a judicial sentence, about which it is difficult to speak with moderation. *Id.*, at 277-278.

Appellant respectfully submits that it is also difficult to speak with moderation about the entry of a default and summary judgment against appellant in the underlying administrative proceeding under the circumstances of this case, wherein counsel for appellant was actually engaged in another forum, pursuant to the return date set in a court order.

CONCLUSION

For the reasons given above, this Court should deny appellee's motion to dismiss or affirm and should note probable jurisdiction of this appeal.

Respectfully submitted,

MAY 31, 1985
~~June~~ , 1985

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APPENDIX A

A2

ORDER OF HON. J. ROBERT LYNCH
dtd. 1/31/85 (Axelrod v. Fahey).

On the return date set forth in the said Order to Show Cause, the petitioner having appeared by Michael J. Hungerford, Assistant Attorney General, and the respondent having appeared by Dante M. Scaccia, Esq., and in person, and this matter having duly come on before the Court to be heard, the Court having heard oral argument in support of the petitioner's application and in opposition thereto, reserved decision,

The Court, having, on January 9, 1985, rendered a decision in writing, finding and concluding that the appointment of a receiver was mandated by paragraph (a) of subdivision 2 of Public Health Law §2810, working in conjunction with Public Health Law §2806.5(a), by reason of the fact that the respondent had been convicted of federal income tax evasion, directed the appointment of a receiver and that, in the event that the parties could not agree to the rent to be paid to the respondent pursuant to Public Health Law §2810, a hearing be held to determine the amout of such rent,

The respondent having, on January 23, 1985, applied for reconsideration of the Court's decision upon the ground that the mandatory language of Public Health Law §2810.2(a) is not made applicable to this proceeding, in conjunction with Public Health Law §2806.5(a), by reason of the fact that the offense of which the respondent was convicted is not a felony under New York law, and therefore the provisions of Public Health Law §2806.5(a) are not applicable to the respondent herein,

The Court having treated the respondent's said application as an application for leave to reargue, and having considered said application based upon the Order to Show Cause, Petition and supporting papers above mentioned, and the Answer and supporting papers above mentioned, hereby grants leave to reargue and hereby finds and concludes as follows:

(1) That the respondent's conviction for federal income tax evasion would not be a felony in New York;

ORDER OF HON. J. ROBERT LYNCH
dtd. 1/31/85 (Axelrod v. Fahey).

(2) That the mandatory language of Public Health Law §2810.2(a), read in conjunction with Public Health Law §2806.5(a), has no application to this proceeding;

(3) That a hearing should be held pursuant to Public Health Law §2810.2(a) to determine whether there is a need for the appointment of a receiver for the said facility;

(4) That pursuant to Public Health Law §2810, such hearing is to take precedence over every other business of the Court, and that the undersigned is not scheduled to preside as Justice of the Supreme Court, Onondaga County, at Syracuse until April, 1985;

And the Court having discussed the disposition of such hearing with the Hon. William R. Roy, Administrative Justice for the Supreme Court, Fifth Judicial District, it is

ORDERED that pursuant to Public Health Law §2810 a hearing be held to determine whether the appointment of a receiver for Castle Rest Nursing Home is necessary, and it is further

ORDERED that in the event that the parties so stipulate, the Hon. Richard Aronson, Justice Ret., be and the same hereby is appointed as Judicial Hearing Officer to conduct said hearing pursuant to Public Health Law §2810, and it is further

ORDERED that, in the event that the parties are unable to so stipulate, this matter be referred to the calendar justice for the Supreme Court, Onondaga County.

Dated: Lowville, New York
January 31, 1985.

ENTER S/J. Robert Lynch, J.S.C.

A4

ORDER OF HON. J. ROBERT LYNCH
dtd. 1/31/85 (Axelrod v. Fahey).

I the undersigned, an Attorney at Law, DO HEREBY CERTIFY pursuant to Section 2105 CPLR that I have compared the foregoing copy with the original and have found it to be a true and complete copy thereof, the original having been filed in the Office of the Clerk of Onondaga County, New York, on the 5th day of February, 1985.

Dated: February 5, 1985.

S/ Robert A. Traylor